Supreme Court, U.S.
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No. 92-37

# In the Supreme Court of the United States

OCTOBER TERM, 1992

LEE ALEXANDER, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the Tax Court's denial of a motion for leave to vacate a previously affirmed decision constitutes an abuse of discretion when there was no allegation of fraud on the court and the motion was both unsubstantiated and untimely.

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### OPINIONS BELOW

The opinions of the court of appeals (Pet. App. D1-D3) and Tax Court (Pet. App. C1-C2) are unreported. The decision of the court of appeals is noted at 956 F.2d 1161 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on January 30, 1992. A petition for rehearing was denied on April 3, 1992 (Pet. App. E1-E2). The petition for a writ of certiorari was filed on July 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner was the mayor of Syracuse, New York, from January 1, 1970, through December 31, 1985. From 1979 through 1986, petitioner extorted funds and received money from persons wishing to do business with the City of Syracuse. The income that petitioner thus received was not reported on his federal income tax returns. Petitioner was indicted and pled guilty to income tax evasion (26 U. S. C. 7201) in connection with those returns (Pet. App. A4-A6).

2. The Commissioner asserted income tax deficiencies and additions to tax for fraud and for substantial understatements of income tax liability resulting from petitioner's unreported income during the years 1979 through 1986. Petitioner sought redetermination of the asserted deficiencies in the Tax Court. The Commissioner served petitioner with requests for admission under Rule 90 of the Tax Court's Rules. Petitioner failed to respond to those requests during the time allowed and also failed to request additional time within which to respond (Pet. App. A2-A4).

Based on the facts set forth in the unanswered requests for admission, the Commissioner moved for summary judgment in the Tax Court. The court ruled that the facts contained in the requests for admission were conclusively established by petitioner's failure to answer or object. The court therefore upheld the deficiency determinations and additions to tax (Pet. App. A4, A6-A10).

The court of appeals affirmed (Pet. App. B1-B5). The court held that the Tax Court acted within its discretion in deeming the matters in the requests for admissions to be admitted and in granting the motion for summary judgment. The court emphasized that, if petitioner desired relief from the deemed admissions, the proper

course was to move the Tax Court for leave to withdraw or modify the admissions under Tax Court Rule 90(f), not to challenge them in the court of appeals (Pet. App. B4-B5).

3. Petitioner did not seek further review of that decision. Instead, 75 days after the judgment was entered by the court of appeals, petitioner moved the Tax Court to vacate the judgment (C. A. App. 117-127).[1] In support of that motion, petitioner claimed that his Tax Court counsel had misrepresented to petitioner that he had ample time to respond to the requests for admissions (*id.* at 120-121). Petitioner claimed that the alleged negligence of his counsel justified vacation of the Tax Court's prior decision (Pet. App. C1, D2).

4. The Tax Court denied petitioner's motion (Pet. App. C1-C2) and the court of appeals affirmed (*id.* at D1-D3). The court of appeals noted that petitioner had not alleged that any fraud had occurred in the Tax Court proceedings and, at most, claimed that he had been misled or deceived by his counsel (*id.* at D3). The court emphasized, moreover, that petitioner's allegations that his counsel had misled him were not substantiated (*ibid.*) and that the motion to vacate the judgment was untimely under the Tax Court rules (*ibid.*). In these circumstances, the court of appeals concluded that the Tax Court acted "well within its discretion in denying [petitioner's] motion" (*ibid.*).

## ARGUMENT

The court of appeals correctly held that the Tax Court did not abuse its discretion in denying petitioner's motion to vacate its prior decision. This fact-specific decision does not conflict with any decision of this Court or

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[1] "C. A. App." refers to the joint appendix filed in the court of appeals.

of any other court of appeals. Further review is therefore not warranted.

1. As the court of appeals correctly observed (Pet. App. D2), petitioner did not allege that a fraud had been committed on the Tax Court. Absent such an allegation, the Tax Court lacked jurisdiction to vacate its prior final decision. See *Senate Realty Corp.* v. *Commissioner*, 511 F.2d 929, 931 (2d Cir. 1975).[2]

Fraud on the court is fraud that defiles the court itself or that renders the court incapable of impartially judging the case. 511 F.2d at 931. Gross neglect on the part of taxpayer's counsel does not constitute fraud on the court. See *Kenner* v. *Commissioner*, 387 F.2d 689, 692 (7th Cir. 1968) (that counsel failed to represent the taxpayer's interests vigorously, and took steps prejudicial to him, fails "to describe any fraud practiced upon the tax court"). See also *Heim* v. *Commissioner*, 872 F.2d 245, 248 (8th Cir. 1989); *Universal Film Exchanges, Inc.* v. *Lust*, 479 F.2d 573, 576-577 (4th Cir. 1973).

Since petitioner made no allegation that a fraud had been committed on the Tax Court, petitioner's motion to vacate the Tax Court judgment was properly denied. See *Bulloch* v. *United States*, 721 F.2d 713, 718 (10th Cir. 1983); *Anderson* v. *Commissioner*, 693 F.2d 844, 846 (9th Cir. 1979).[3]

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[2] Other circuits have held that the Tax Court may also vacate a final decision if the court concludes that it had no subject matter jurisdiction when the decision was first entered. See *Webbe* v. *Commissioner*, 902 F.2d 688, 689-(8th Cir. 1990); *Billingsley* v. *Commissioner*, 868 F.2d 1081 (9th Cir. 1989).

[3] Petitioner errs in asserting (Pet. 6-9) that the decision in this case conflicts with *Hanover Insurance Co.* v. *United States*, 880 F.2d 1503 (1st Cir. 1989). *Hanover Insurance* concerned the question of when a deficiency upheld by the Tax Court may be assessed and collected by the Commissioner. The court concluded that taxes may be assessed upon expiration of the time for filing a

2. The court of appeals also correctly concluded (Pet. App. D3) that petitioner's motion was untimely and unsubstantiated. Tax Court Rule 162 provides:

> Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit.

Petitioner filed his motion for leave to vacate on April 30, 1991, which was ten months after the Tax Court entered its decision on June 27, 1990, and 74 days after the court of appeals affirmed the Tax Court's decision. Since the motion was not filed within 30 days after entry of the decision, the Tax Court acted "well within its discretion" (Pet. App. D3) in denying the motion as untimely. This is especially so since no extraordinary circumstances were shown to justify the delay. See *Home Furniture Co.* v. *Commissioner*, 168 F.2d 312, 314 (4th Cir. 1948) (entertaining an untimely motion is within the grace of the court); *Regency Realty* v. *Commissioner*, 28 A.F.T.R.2d (P-H) 5420 (4th Cir. 1971).

Moreover, as the court of appeals emphasized (Pet. App. D3), the allegations upon which petitioner based his motion were unsubstantiated. Petitioner asserted that his counsel misrepresented that he had until August 11, 1989, to respond to the requests for admission. In support of that assertion, petitioner pointed to a letter from

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petition for certiorari from the decision of the court of appeals that affirmed the Tax Court decision. See *id.* at 1505.

*Hanover Insurance* does not address (or have relevance to) the question presented in this case, which concerns the scope of the discretion of the Tax Court to vacate a decision of that court that has been affirmed on appeal. Even when the time for certiorari has not expired, the judgment of the court of appeals is binding on the Tax Court (see 26 U.S.C. 7481(a)(2)) and may not be vacated by it except in the limited circumstances described in the text.

his counsel dated July 11, 1989 (C. A. App. 120-121, 126-127). But that letter did not make any misrepresentation to petitioner. The letter referred to the enclosed requests for admission, stated that the Tax Court rules allowed 30 days to respond, emphasized that additional time to respond would be needed and that petitioner should quickly reply to the letter to buttress any request to be made for additional time to respond (C. A. App. 126-127).[4]

Petitioner errs in claiming (Pet. 9-10) that the court of appeals lacked jurisdiction to decide that the motion was untimely or unsubstantiated because the Tax Court

[4] *United States* v. *Cirami*, 563 F.2d 26 (2d Cir. 1977), upon which petitioner relies (Pet. 10-12), is inapposite. That case involved an attorney's failure to respond to a motion for summary judgment. The Second Circuit initially affirmed the district court's denial of the motion to vacate the judgment, emphasizing that the defendants presented no evidence of the circumstances pertaining to their failure to respond to the government's motion. The Ciramis filed a second motion to vacate, submitting affidavits and evidence explaining the reasons for their counsel's failure to respond to the motion. The district court again denied their motion, but this time the Second Circuit reversed. Based on the new evidence, the court of appeals found "the possibly unique fact of what we may term the 'constructive disappearance' of defendants' attorney, who was allegedly suffering from a psychological disorder which led him to neglect almost completely his clients' business while at the same time assuring them that he was attending to it, and who had made himself unavailable even to the trial judge." 563 F.2d at 34. The court also noted (*id.* at 35) that the defendants did not themselves appear to have been neglectful.

Here, in contrast, petitioner has not submitted affidavits from his attorney demonstrating a similar abdication of his duties. Indeed, petitioner's attorney continued actively to participate in the case to its conclusion. Moreover, petitioner's counsel clearly advised him by letter of the time allowed to respond to the request for admissions and emphasized the importance of responding (or requesting additional time) promptly (C. A. App. 126-127).

did not deny the motion on these grounds. The court of appeals may affirm the judgment on any grounds available below. See *University Club* v. *City of New York*, 842 F.2d 37, 39 (2d Cir. 1988); *Furness Withy (Chartering), Inc., Panama* v. *World Energy Systems Associates, Inc.*, 772 F.2d 802, 808 (11th Cir. 1985) (citing *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977)).[5]

3. Petitioner errs in asserting (Pet. 16-17) that the Tax Court should have imposed sanctions upon his attorney instead of penalizing petitioner by deeming the unanswered requests for admission to have been admitted. As this Court stated in *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962):

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

See also *Cine Forty-Second St. Theatre* v. *Allied Artists Pictures Corp.*, 602 F.2d 1062, 1067 (2d Cir. 1979); *United States* v. *Cirami*, 535 F.2d 736, 739 (2d Cir. 1976) (a client is not to be relieved of the "mistake or omission of his attorney by reason of the latter's ignorance of the law or of the rules of the court, or his inability to efficiently manage his caseload"); *Urban Elec. Supply & Equipment*

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[5] The courts of appeals have the same jurisdiction to review decisions of the Tax Court that they have for civil actions tried to district courts without a jury. 26 U.S.C. 7482(a); *Commissioner* v. *McCoy*, 484 U.S. 3, 6 (1987).

*Corp.* v. *New York Convention Ctr. Dev. Corp.*, 105 F.R.D. 92, 98 (E.D.N.Y. 1985).[6]

Petitioner errs in contending (Pet. 12-15) that the Tax Court should have held an evidentiary hearing prior to denying the motion for leave to vacate. The cases upon which he relies do not support his argument. Those cases involved the situation where the trial court imposed the harshest sanction available for an attorney's noncompliance with the court's rules—dismissal of the case.[7] The present case does not involve the imposition of sanctions. Instead, it involves the direct application

[6] Petitioner's reliance (Pet. 16-18) on *Carter* v. *Albert Einstein Medical Center*, 804 F.2d 805 (3d Cir. 1986), is misplaced. In that case, unlike the present case, the attorney's personal conduct was inexcusable because she "exhibited, on the record, blatant disregard for explicit orders." *Id.* at 806. Consequently, rather than the sanction of dismissal, the court of appeals directed the district court to reinstate the complaint and to impose sanctions on the attorney. *Ibid.*

[7] In *Hillig* v. *Commissioner*, 916 F.2d 171 (4th Cir. 1990), the Tax Court dismissed the case because of the attorney's failure to comply with various Tax Court rules. The Fourth Circuit vacated and remanded, stating that sanctions were justified against the attorney, but that imposing the severe sanction of dismissal was too harsh because it penalized the blameless taxpayers. Likewise, *Jackson* v. *Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1977), disapproved of the district court's dismissal with prejudice without a trial because that is a drastic sanction that is normally imposed only after unfruitful resort to lesser sanctions. *Id.* at 123. In *Fuller* v. *Quire*, 916 F.2d 358 (6th Cir. 1990), the district court was held to have acted within its discretion in reinstating a complaint under Fed. R. Civ. P. 60(b)(6) several years after the complaint had been dismissed for failure to prosecute. The court of appeals in *Crandall* v. *Commissioner*, 650 F.2d 659 (5th Cir. 1981), reversed and remanded for findings as to whether the Tax Court's dismissal of a *pro se* petition was justified under the circumstances.

of the Tax Court's "own unambiguous rule regarding requests for admission" (Pet. App. B5).[8]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Under Tax Court Rules 90(g) and 104(c)(4), the Commissioner could have requested sanctions for petitioner's failure to respond, including dismissal of the case, but he did not do so.